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No. 217

In The

Supreme Court of the United States

October Term, 1960

Noble Garnett Cope, Frank Stokes Davis, Robert Lee Dowell, Grady Lee Estep, Edwards Eugene Kennedy and William Howard McDowell,

Petitioners

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ——

NOLLIE GARNETT COPE, FRANK STOKES DAVIS, ROBERT LEE DOWELL, GRADY LEE ESTEP, EDWARD EUGENE KENNEDY and WILLIAM HOWARD McDOWELL,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on June 6, 1960.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the Fourth Circuit which is printed in the Appendix to this Petition is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was dated and entered on the 6th day of June, 1960. An Order for Stay of Mandate was entered by the Court of Appeals on June 15, 1960. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether the conduct of the trial was in such a manner that would fail to meet the constitutional requirement of due process of law.

2. Whether the following factors, considered collectively, in the process of a criminal trial, were of such nature as to offend the requirements of the 5th Amendment.

(a) The Court, over objections of Petitioners, permitted into evidence sale of truck load of glass jars to one of Petitioners on April 18, 1958, prior to any evidence of formation of conspiracy, and which in no wise conformed to Bill of Indictment.

(b) The Court on various occasions permitted witness to testify as to conversation with one of Petitioners in the absence of others, before the conspiracy was proven, the other Petitioners objected, the Court admitted it was incompetent but let it be introduced into evidence by saying "yes, sir, well, if you'll call it to my attention if they do not tie it up I will strike it out and instruct the jury not to consider it".

(c) The Court permitted Government to exhibit before the jury a bottle containing what was said to be a product of distillery operated by Petitioners on which was inscribed in bold large letters the word "POISON".

(d) The Court's statement in the presence of the jury concerning evidence Government was in process of introducing, "is there any question about this?, it has been testified to, if anybody doubts it", etc.

(e) The argument of the District Attorney could be construed as comment on failure of Petitioners to take witness stand and testify in their own behalf.

(f) Evidence inadvertently misquoted by the Judge in his charge to jury.

3. Whether the trial judge should have taken cognizance of an Order issued by the United States District Court for the Eastern District of South Carolina on Motion to Suppress Evidence by reason of an illegal arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, which provides in relevant part "Nor be deprived of life, liberty, or property, without due process of law".

STATEMENT

The Petitioners herein were indicted in the United States District Court for the Middle District of North Carolina, at Greensboro, on a charge of conspiracy, alleging a conspiracy was formed and entered into in said District to procure materials and erect an illicit distillery in the Collins Creek section of Horry County in the State of South Carolina. The inception of the conspiracy as set forth in the Bill of Indictment was brought about by various telephone calls during the months of July, August, and September, 1958, between Cope, Davis and McDowell, to and from Winston Salem, High Point and Asheboro, in the Middle district of North Carolina, and Myrtle Beach in South Carolina.

It was further contended that Petitioner McDowell, a machinist and shop operator in High Point procured the construction of two high-pressure tanks from City Welding Company in High Point, North Carolina. These tanks were the usual type generally used as hot water storage tanks, air tanks, gasoline tanks and oil tanks. McDowell paid for these tanks when they were loaded on a truck driven by Estep. The truck was followed by Government agents to Myrtle Beach, South Carolina, thence to the Collins Creek section where it was lost and not seen until several hours later when it was again picked up at Conway, South Carolina and followed into the State of Virginia where it was inspected and found empty.

The Government further charged and introduced testimony that Cope purchased approximately 900 cases of half-gallon jars at Asheboro, North Carolina, on August 24, 1958, and was transported to South Carolina. There was also introduced in evidence, over the objections of Petitioners, that Cope purchased 950 cases of jars in Asheboro, North Carolina, on April 18, 1958, before the date of the alleged conspiracy. This in substance is the evidence the Government relied on to prove that a conspiracy was founded in the Middle District of North Carolina.

Petitioners concede that the Government proved that an illicit distillery was discovered in operation in Horry County, South Carolina, and that during the trial there was testimony identifying all those indicted as being at the distillery except McDowell. There was no evidence that Davis or Dowell were ever in North Carolina or McDowell in South Carolina. Cope, Kennedy and Estep were identified as being in both States.

There were certain vehicles identified as having been in North Carolina which were seen at the residence of Davis at Myrtle Beach, South Carolina. The distillery in the

Collins Creek section of South Carolina was raided in the early morning hours on September 5, 1958. Dowell, Minter and Ellis were arrested at the still site. Estep and Kennedy were arrested in Elizabethtown, North Carolina, on the morning of September 5, 1958, while driving a semi-truck and trailer loaded with illicit whiskey. Davis and Cope were arrested on the same day about 11 o'clock A.M. at Kittrell's Landing, which is located on the Waccamaw River, south of Myrtle Beach, South Carolina, as they were preparing to leave on a fishing trip. Cope and Davis were arrested without a warrant.

On October 7, 1959, Cope and Davis moved in the United States District Court at Florence, South Carolina, for the return of personal property removed from their persons when taken into custody at Kittrell's Landing in South Carolina on September 5, 1958, when they were arrested without a warrant, and also for an Order suppressing the evidence in connection therewith. After hearing from Petitioners and the Government, the Court issued an Order that the arrest was illegal and granted the motion to suppress the evidence.

Upon the coming in of the verdict the Petitioners jointly and severally moved to set the verdict aside, which was denied (R. 88). The Petitioners then jointly and severally moved for a new trial, motion denied (R. 89).

Judgment of the District Court that Cope be fined $10,000 and be imprisoned for four years and stand committed until fine is paid or otherwise discharged according to law. Davis fined $10,000 and imprisoned for four years, with same condition as to Cope. McDowell imprisoned for fifteen months, Dowell imprisoned for three years, Estep fined $1,000 and sentenced to imprisonment for three years under the same conditions as Cope, Kennedy fined $1,000 and sentenced to imprisonment for eighteen months, same conditions as Cope (R. 116, 118).

Petitioners duly and timely filed an Appeal from the judgment of the District Court to the United States Court of Appeals for the Fourth Circuit. On June 6, 1960, the Court of Appeals rendered an opinion affirming the judgment of the District Court printed in Appendix to this Petition but not yet reported.

REASONS FOR GRANTING THE WRIT

Petitioners were denied the right of a fair and impartial trial as guaranteed and contemplated by the due process of law clause as set forth in the Fifth Amendment to the Constitution of the United States. The trial Court permitted errors to be committed time and time again, the cumulative effect of which denied Petitioners the right and Constitutional protection to which they were entitled. As in Moore v. Dempsey, 261 U.S. 86 what we have here are not "mere mistakes of law", but a combination of factors exceedingly detrimental and injurious to Petitioners. In the trial of this case the prosecution spent much time in showing and demonstrating to the jury the magnitude of the illicit distillery raided in the Collins Creek section of South Carolina and from reading the record in this case, one can not help but being impressed that the Petitioners were being tried, not for a conspiracy in the Middle District of North Carolina, but for the offense of illegal manufacturing whiskey in South Carolina.

The offense of conspiracy as charged in the Bill of Indictment had its inception with a number of telephone calls on divers dates in July, August and September, 1958. These calls were made by Cope, Davis and McDowell to and from Winston Salem, High Point, and Asheboro, North Carolina, and Myrtle Beach, South Carolina. These telephone calls, together with the procuring of two metal tanks by McDowell, together with the fruit jars purchased by Cope, constituted the contentions

of a conspiracy in the Middle District of North Carolina. At or near the beginning of the trial and after the introduction of telephone toll cards, etc., the prosecution offered evidence by its witness, Clyde Ayers, (R. 20) that on April 18, 1958, he sold to Nollie Cope (one of the Defendants), approximately 950 cases of glass jars. The Petitioners vigorously objected to this testimony on the grounds (a) that the incident was so far removed from the inception of the conspiracy (dates of telephone calls set forth in Bill of Indictment July, August and September, 1958), that it was entirely a separate transaction and could in no wise be connected with this conspiracy;

It is further contended here: (b) that the property on which the distillery was located was not leased according to Bill of Indictment until August 1, 1958; (c) that the two metal tanks were not acquired until August 6, 1958, at which time it is alleged they were moved to the leased property in South Carolina; (d) that Bill of Indictment alleges that Cope, et al, purchased 900 cases of half-gallon jars on August 24, 1958. (Basis of objection in lower Court set forth on page 21 Appendix filed in said Court).

The Court overruled the objection of Petitioners and permitted this damaging evidence to be introduced by saying "The Court, well, it alleges that prior to July, 1958, (speaking of Bill of Indictment), I don't know about the other allegation here, maybe that is another transaction the Government expects to prove, I have no way of knowing that, OBJECTION OVERRULED." (R. 21) In this instance the Court seems to be going far afield, in fact when he said "Maybe this is another transaction the Government expects to prove" gives every indication that as far as incompetent evidence was concerned the Court had "opened the gate". The damage to Petitioners case in this instant was immeasurable. The mere fact that this transaction was in no way tied to the conspiracy or its formation, was some time prior to telephone calls

(set forth in Indictment), the property on which distillery was located was not leased until August 1, 1958, the metal tanks were not acquired until August 6, 1958, all point to a separate and distinct transaction which was saddled on the neck of Petitioners. The variance in this instance certainly seems to fall within the category as set forth by this Court in Berger v. U. S. 295 U.S. 82, "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charge against him, so that he may be enabled to present his defense and not taken by surprise by the evidence offered at the trial, and (2) that he may be protected against another prosecution for the same offense." The Court further said in the same case on page 81 "If the proof had been confined to that conspiracy the variance, as we have seen, would not have been fatal". The Court on page 82, Berger case citing "Bennett v. U. S. 227 U.S. 333, 338".

Certainly in the case at Bar the evidence heretofore referred to in no way related to the conspiracy on trial.

The Court on various occasions permitted witness to testify as to conversation with one of the Petitioners in the absence of other Petitioners. On the occasion in question the witness Pinson was asked about a conversation with Petitioner Davis; the other Petitioners objected, the Court said "Yes, sir, well, if you'll call it to my attention if they do not tie it up I will strike it out and instruct the jury not to consider it, etc." (R. 23). Later Petitioners made another similar objection, but the Court overruled the objection and stated "Well, as to all of this, if . . . there must be a time of necessity when some of this evidence is not competent to the others until the Government has offered evidence tending to establish a conspiracy, and I'll instruct the jury not to consider it as

to the co-defendants if it is not connected up." (R. 29). Again a similar objection was was made which the Court overruled (R. 30). It is a well established principle of law that connection with conspiracy must be established before acts and statements of others are admissible against a co-defendant. In the case of United States v. United States Gypsum Co. et al. (67 Fed. Supp 397) the Court said "some substantial evidence showing a connection of a defendant with a conspiracy must be introduced before the acts and statements of others are admissible against him". (Kuhn v. United States, 26 Fed. (2nd) 463).

In this case it is urged that the Court permitted introduction of evidence which was admitted incompetent, giving the jury the full impact, with the statement to Counsel for Petitioners "if the Government does not tie it up, I will strike it out if you call it to my attention". This places on Counsel a responsibility of unnecessary magnitude, in fact an almost impossibility, to keep track of such objections and call it to the attention of the Court at the proper time.

During the examination of Government witness Vaughn, the prosecution exhibited before the jury a bottle containing a sample taken from the truck seized at Elizabethtown, which was alleged to be a product of the distillery operated by Petitioners (R. 405, App. 36). This bottle contained a large label in bold letters marked "POISON". The Petitioners claimed it was prejudicial. The Court did not know what Petitioners meant but the Government got the idea because the prosecution went to great lengths to attempt to clear up what was known to be prejudicial. (R. 40, 41, 42). It is seriously contended that even though the jury was instructed that the sample was not poison is was hard to erase the picture from their minds that the product of this distillery was not only unlawful, but poison. Although Mr. Justice Jackson was speaking of post-conspiracy admissions in Krulewitch v. U. S., 366 U.S. 440, 446, "The naive assumption that prejudicial

effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction". The same rule can well apply in this instance.

After the Government had called its twenty-fourth witness, and without excusing the jury, the Court interrupted the Government's case to make this comment, "Is there any question about this? It has been testified to. If anybody doubts it, I mean, if there's any evidence to the contrary you can bring him back, but I, purely in the interest of time, if there's something this witness knows that somebody else doesn't know" (R. 23). It is true that the trial judge was referring to previous testimony concerning the tanks found at the distillery, nevertheless, the pointed statement "is there any question about this" could mean in the minds of the jury that the Government had "wrapped up its case". It was all over except the formality of their verdict of guilty. We are of the opinion that these cases apply, "Quercia v. U. S., 189 U. S. 46, Mullen v. U. S., 106 Fed. 892, Wissel v. U. S., 22 Fed. (2nd) 468".

The argument of the District Attorney to the jury could well be construed as comments on failure of Petitioners to take the witness stand and testify in their own behalf. He said "Well, just let me ask you one question in this case—if you are not going to believe the officers that went on the witness stand in this case who are you going to believe? You agreed to go by the evidence. Who are you going to believe about it?". (R. 50-51)

"That's what the evidence is in this case, gentlemen of the jury, they didn't have any evidence to ask you to believe anybody. They say they are guilty of making liquor but there was no agreement, no understanding about anything, and if you believe there was no agreement under this evidence then I agree with them, if that's all there is in this case and you say these officers are swearing a lie, you ought to find each and every one of these de-

fendants not guilty; but on the other hand if they are not telling the truth wouldn't you like to say who is telling the truth, wouldn't you like to have somebody to say up there what is the truth, if these officers they say are swearing a lie and you ought not to believe them". (R. 54)

In Berger v. U. S., 295 U. S. 78, this Court said "It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features."

In Knowles v. U. S., 224 Fed. (2nd) 168 Judge Murrah stated "It is concededly improper and reversible error to comment on failure of a defendant to testify in his own behalf, and the test is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

Petitioners respectfully request that the Court read the argument in full and we have printed it as part of the Appendix in the lower Court.

The Court inadvertently misquoted the evidence. In the first paragraph of his charge to the jury as set forth

on page 73 of the Appendix filed in the Court below, the Court said "The Government has further offered the testimony of Mr. Miller over at the City Welding Company in High Point who testified that about August 6th that—or some date thereabout—that the defendant McDowell came to him with a sketch or drawing and wanted him to fabricate two high pressure tanks . . ." "that he took the sketch or the drawing at the instance of the defendant McDowell and he fabricated the high pressure tanks and that some time later after he had them fabricated, he had them painted black—as specified— . . .".

Mr. Miller testified that he, Miler, made the sketch or drawing (R. 136) and he, Miller, said nothing about the color. Then again the Court makes it appear that McDowell and Estep were followed down to South Carolina with the tanks (R. 74). The evidence was silent as to McDowell although there was evidence that Estep was followed into South Carolina.

It is true that Government witness testified that the sliver tractor trailer which was seized with a load of whiskey at Elizabethtown was seen going in and out of the distillery on several occasions, the Court found it to be a fact that the truck went in and out "almost daily" (R. 77). The Court further had Davis owning a Cadillac automobile that he was supposed to have been riding in as a passenger when he is alleged to have gone into the distillery (R. 81). Inaccurate statements of fact should not be made by the judge, Burnett v. U. S., 62 Fed. (2nd) 452.

Error on the part of the Court in making a comment that is not sustained by the evidence is not cured by telling the jury that it is not bound by the Court's opinion of the evidence. Positive declarations of the Court cannot be dislodged from the minds of the jury by telling them that they are the sole judges of the facts. Mullen v. U. S., 106 F. 892; Frantz v. U. S., 62 F.(2nd) 737.

While there is no hard and fast rule determinative of what a trial judge may or may not say to a jury in commenting on the weight or significance of the evidence and the extent to which the Court shall comment upon the evidence, it is largely a matter within the Court's discretion, however each case, in a large measure, depends upon its own peculiar circumstances. Malaga v. U. S., 57 F. (2nd 822; Stokes v. U. S., 264 F. 18; Weare v. U. S., 1 F. (2nd) 617.

The courts have recognized, however, that the influence of the trial Judge on the jury is of great weight; that "his lightest word or intimation is received with deference and may prove controlling;" and have observed that his privilege of commenting upon and weight and significance of the evidence is too important to be left without safeguard against abuse. Quercia v. U. S. (1932) 189 U. S. 466; 77L. Ed. 1321, 53 S. Ct. 698.

The trial Court was required to take cognizance of an order issued by the United States District Court for the Eastern District of South Carolina on motion to suppress evidence by reason of an illegal arrest. The Petitioners Davis and Cope were arrested on the morning of September 5th about 11 o'clock A.M. at Kittrell's Landing which is located on the Waccamaw River, South of Myrtle Beach, South Carolina, as they were preparing to leave on a fishing trip. They were arrested without a warrant, they had no illegal whiskey and the doctrine of "hot pursuit" is not involved. Under Rule 41(e) of the Federal Rules of Criminal Procedure, Petitioners Cope and Davis moved in the United States District Court at Florence, South Carolina (the District in which the arrest occurred) on October 7, 1959, at 10 o'clock in the forenoon for an Order requiring the United States of America to return to said Petitioners the personal property removed from the persons and possession of these Petitioners on or about September 5, 1958, at Kittrell's Landing, South Carolina, and for an Order suppressing and prohibiting

use of said personal property as evidence against them in any criminal proceeding in any of the Courts of the United States or any evidence or information gained by the United States of America from the use of said personal property, including but not limited to certain items of personal property set forth in Affidavit filed in support of the motion. The Notice and Motion to suppress evidence was served on the United States Attorney and his Assistant for said District, the Supervisor-in-Charge, Alcohol and Tobacco Tax Division, Internal Revenue Service, and the United States Attorney for the Middle District of North Carolina. The United States Attorney for the Eastern District of South Carolina made a return to the Motion and filed Affidavits, upon argument, the Honorable C. C. Wyche entered an Order dated at Florence, South Carolina on October 7, 1959, holding that, upon the showing made by the United States, the arrest was illegal and granted the Motion to suppress the evidence.

Upon the call of this case for trial and after the jury was empanelled, the Assistant District Attorney stated to the Court that there was a matter that should be heard out of the hearing of the jury. The jury was sent from the room and the Assistant District Attorney called the Court's attention to the Order of Judge Wyche suppressing the evidence, that certain portions of the Government's evidence was involved and he thought the Court should see a copy of said Order. He thereupon handed the Court a certified copy of the Order (R. 5). The Petitioners had heretofore filed an identical motion in the Middle District of North Carolina to suppress the evidence, that Motion was never heard but withdrawn, Petitioners standing on the Order of Judge Wyche in South Carolina. The trial Court refused to recognize the Order to suppress evidence handed down by Judge Wyche (R. 11), stating that he would hear attorneys for Petitioners at the proper time. There is printed in Petitioners Ap-

pendix filed in the lower Court the entire proceedings relating to the Motion to suppress. Counsel for Petitioners, bearing in mind that the Court had said that he would hear them at the proper time on the question of evidence ordered suppressed by Judge Wyche's order, at what was considered to be the proper time, entered objection to testimony the Government was seeking to introduce as to what Davis and Cope were wearing at the time of said illegal arrest. The Court instructed the Government to proceed and never heard the objection (R. 33). It is respectfully submitted that the Court, in ignoring Petitioners objection in this matter, was such as to deprive Petitioners of a fair and impartial trial. Petitioners had proceeded in this matter in accordance with Rule 41(e) of Federal Rules of Criminal Procedure "A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained."

It is therefore urged and contended that Petitioners were within their rights to bring their Motion on for hearing in the District Court for the Eastern District of South Carolina, that the Government was given sufficient notice, was represented, filed affidavits and was bound by the Order to suppress entered by Judge Wyche. That said Order should have been recognized by the trial Judge with full faith and credit and his failure to do so deprived Petitioners of the fair trial to which they were entitled.

The cumulative effect of the independent acts herein complained of thereby deprived Petitioners of the right of a fair trial in which due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States was denied.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8001.

FRANK STOKES DAVIS, WILLIAM HOWARD McDOWELL, NOLLIE GARNETT COPE, ROBERT LEE DOWELL, GRADY LEE ESTEP, and EUGENE EDWARD KENNEDY,
APPELLANTS,

versus

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued May 30, 1960. Decided June 6, 1960.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BARKSDALE, District Judge.

John L. Nettles and W. M. Nicholson (H. E. Yarborough, Jr., on brief) for Appellants, and Lafayette Williams, Assistant United States Attorney, (James E. Holshouser, United States Attorney, on brief) for Appellee.

PER CURIAM:

These defendants were convicted by a jury in the United States District Court for the Middle District of North Carolina on an indictment charging a conspiracy to violate the laws relating to distilled spirits, 18 U.S.C.A. section 371. The broad claim of error which they press on this appeal is that they were denied a fair and impartial trial. They cite, in support of this claim, the following incidents of the trial: (1) the allegedly excessive questioning of witnesses by the District Judge; (2) a discussion between the judge and counsel out of the jury's presence relating to a motion to suppress evidence; (3) the judge's tolerating the District Attorney's argument to the jury which is said to have referred indirectly to the defendant's failure to take the stand; and (4) the judge's summation of the evidence in his charge to the jury.

We have examined the record bearing on the incidents cited and find nothing in them warranting criticism of the conduct of the trial.

The questions addressed by the judge to the witnesses were neither improper nor excessive in amount. They were well within reasonable limits, were calculated to clarify the testimony, and seem to have had that effect. Nor were the questions partial to the Government; such interventions as the judge made from time to time did not violate his role of neutrality.

The United States Attorney's argument cannot be said to have constituted a forbidden comment on the failure of the defendants to testify. He merely reviewed certain testimony and added, truthfully, that there was no evidence in contradiction.

Finally, we discover no ground for complaint either in the judge's remarks made out of the jury's presence, or in his charge, which was a fair and balanced review of the testimony.

Affirmed.